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9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA

11 ATECH FLASH TECHNOLOGY INC. &  
SUNUS SUNTEK INC.

12 Plaintiff,

13 vs.

14 MARTIN C. LIN, YUSHAN WANG, A.K.A.  
SAMANTHA WANG., AND IMAGE  
15 DEVICE INC.

16 Defendants.  
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Case No.: C07 02949 PVT

PLAINTIFFS' MEMORANDUM OF POINTS  
AND AUTHORITIES IN OPPOSITION TO  
DEFENDANTS' MOTION  
TO DISMISS PLAINTIFFS' COMPLAINT

The Hon. Patricia V. Trumbull

Date: September 4, 2007  
Time: 10:00 a.m.  
Courtroom: 5

Filed concurrently:  
Declaration of Larry Liang

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1 **STATEMENT OF ISSUES**

2 1. Whether the court should grant defendant's motion to dismiss plaintiffs' complaint  
3 when the evidence clearly shows complete diversity of citizenship existed for all defendants  
4 while plaintiffs erroneously alleged that defendant Samantha Wang resides in California?

5 2. Whether the court should grant defendants' motion to dismiss plaintiffs' complaint  
6 when the evidence clearly shows that defendant Image Device Inc. has requisite minimum  
7 contacts with California and has availed itself of the privilege of conducting activities in  
8 California?

9 3. Whether plaintiffs have stated a claim against defendants in Counts I through V?

10 **SUMMARY OF ARGUMENT**

11 1. The motion to dismiss of defendants Martin C. Lin ("Lin"), Yushan Wang, a.k.a.  
12 Samantha Wang ("Wang"), and Image Device Inc. ("Image Device") based on lack of complete  
13 diversity of citizenship for all defendants should be denied because the evidence clearly shows  
14 that all defendants are Georgia residents even though plaintiff, on information and belief,  
15 erroneously alleged that defendant Wang resides in California.

16 2. Defendants' motion to dismiss based on lack of personal jurisdiction over defendant  
17 Image Device should be denied because defendant Image Device has requisite minimum contacts  
18 with California and has availed itself to the privilege of conducting business in California by  
19 claiming its headquarter in San Jose, California and conducting business in California through its  
20 corporate address and telephone and fax numbers in San Jose, California.

21 3. Defendants' motion to dismiss based on plaintiffs' failure to state a claim should be  
22 denied because all five counts set forth in plaintiffs' complaint satisfy the "short and plain  
23 statements" of Rule 8(a) and are not preempted by California Uniform Trade Secrets Act.

24 4. Defendants' motion to dismiss should be denied unless defendants prove beyond doubt  
25 that plaintiffs can prove no set of facts in support of their claims.

26 **STATEMENT OF FACTS**

27 Plaintiffs Atech Flash Technology Inc. ("Atech") and Sunus Suntek Inc. ("Suntek") are  
28 the affiliated companies and share the same office located at 46045 Warm Springs Blvd.,

1 Fremont, CA 94539. Suntek engages in the design and manufacturing of computer casing, and  
2 Atech engages in the design and manufacturing of card readers. (Decl. of Liang: ¶2)

3 Defendants Lin and Wang started to work at plaintiff Suntek's office in Georgia in 1998  
4 and were transferred to plaintiff Atech's Fremont office in August 2005. (Decl. of Liang: ¶4).  
5 Defendants Lin and Wang were continued on plaintiff Suntek's payroll while they worked for  
6 plaintiff Atech. (Decl. of Liang: ¶6) Plaintiff Atech paid for defendants Lin and Wang's monthly  
7 rent and automobile lease while they worked in Atech's Fremont office and reimbursed their  
8 business expenses for their jobs performed for plaintiff Atech. (Decl. of Liang: ¶¶ 5 & 6)

9 Defendants Lin and Wang's employment with plaintiffs were contingent upon their  
10 nondisclosure and non-use of plaintiffs' confidential proprietary information, which defendants  
11 Lin and Wang agreed. (Decl. of Liang: ¶¶ 3, 4, & 9) Defendants Lin and Wang resigned their  
12 jobs with plaintiffs Suntek and Atech on March 31, 2007 and started to compete against plaintiff  
13 Atech directly by using plaintiffs' confidential proprietary information that they acquired  
14 through their employment with plaintiffs. (Decl. of Liang: ¶¶ 8 & 10)

15 Defendants Lin and Wang set up defendant Image Device in Georgia (Decl. of Lin: ¶¶ 15  
16 & 16) and used 5339 Prospect Road, Suite 280, San Jose, CA 95129 and (408) 455-3698 and  
17 (408) 257-1169 as defendant Image Device's headquarter and contacting phone and fax  
18 numbers. (Decl. of Liang: ¶¶ 11 & 12)

19 While defendant Lin signed his declaration in support of defendants' motion to dismiss  
20 under penalty of perjury under the laws of the United States on July 20, 2007, his declaration is  
21 clearly in contradiction to the 2006 Corporation Annual Registration of defendant Image Device  
22 and its representations set forth in its website. (Decl. of Lin: ¶¶ 26, 27, 28, 29, 31, 32, 33, & 34)  
23 (Decl. of Liang: ¶ 11, Exs. G, H, & I) Plaintiffs request this Court to take judicial notice of the  
24 Image Device's 2006 Corporation Annual Registration filed with the Georgia Secretary of State  
25 and its website showing that its office location was in San Jose, California.

26 Plaintiff Atech's majority of income derives from its sales of products to digital image  
27 and photo kiosk industry, which is not generally known to the public. (Decl. of Liang: ¶¶ 13 &  
28

14) Defendants have specifically targeted its sales of competing products on such buyers (Decl. of Lin: ¶¶ 19, 21, 23 & 24)

### ARGUMENT

#### I. COMPLETE DIVERSITY OF CITIZENSHIP BETWEEN ALL PLAINTIFFS AND DEFENDANTS EXISTS.

The US Supreme Court held that complete diversity of citizenship between all plaintiffs and defendants must exist to confer such jurisdiction. *Lincoln Prop. Co. v. Roche*, 126 S. Ct. 606, 613 (2005)

Defendants Lin and Wang are husband and wife and reside in Suwanee, Georgia. (Decl. of Lin: ¶¶ 3 & 10) They incorporated defendant Image Device in Georgia. (Decl. of Lin: ¶¶ 2, 15, & 17) Plaintiffs Suntek and Atech are California corporation. (Decl. of Liang: ¶ 1) Therefore, complete diversity of citizenship between all plaintiffs and defendants exist in this case.

Plaintiffs have, on information and belief, erroneously stated in the complaint that defendant Wang resided in San Jose, California (Comp: ¶ 3), and have unintentionally omitted to include defendant Wang in its jurisdiction statement (Comp: ¶6 (b)). However, the aforesaid errors do not negate the establishment of subject matter jurisdiction in this case. Accordingly, defendants' motion to dismiss based on lack of complete diversity of citizenship for all defendants should be denied.

Rule 15(a) of the Federal Rules of Civil Procedure provides that a party may amend his pleadings once as a matter of course at any time before a responsive pleading is served. *Guam Investment Company v. Central Building, Inc.*, 288 F.2d 19, 24. (9<sup>th</sup> Cir. 1961) Therefore, plaintiffs are entitled to amend their complaint to cure the aforesaid errors.

#### II. THIS COURT HAS PERSONAL JURISDICTION OVER DEFENDANT IMAGE DEVICE BECAUSE IT IS DOING BUSINESS IN CALIFORNIA, AND HAS PURPOSEFULLY AVAILED ITSELF TO THE PRIVILEGE OF CONDUCTING BUSINESS IN CALIFORNIA.

Principles of general jurisdiction dictate that a party may be subject to suit on all claims in a forum when he has sufficient contacts with the forum state. *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414-15 (1984) Otherwise, personal jurisdiction must be



1 premised on a finding of specific jurisdiction assessed by the relationship among the defendants,  
2 the forum and the litigation. *Id.* at 414. The minimum contacts can be established by defendant's  
3 continuous and systematic contacts with the forum state that tantamount to doing business within  
4 that state. *Id.* at 416.

5 In deciding specific jurisdiction, the court will evaluate the nature and quality of the  
6 defendant's contacts: (i) the nonresident defendant must do some act or consummate some  
7 transaction within the forum or perform some act by which he purposefully avails himself of the  
8 privilege of conducting activities in the forum and thus invoking the benefits and protection of its  
9 laws; (ii) plaintiff's claim must be one which arises out of or results from defendant's forum-  
10 related activities; and (iii) exercise of jurisdiction is reasonable. *Gordy v. Daily News, L.P.*, 95  
11 F.3d 829, 831-32 (9<sup>th</sup> Cir. 1996)

12 Defendant Image Device has gone far beyond the requisite minimum contacts as set forth  
13 in *Helicopteros* above. Defendant Image Device has indeed transacted business within  
14 California. Defendant Image Device in its 2006 Corporation Annual Registration filed with the  
15 Georgia Secretary of State stated that its sole officer was defendant Lin and its office was located  
16 at 5339 Prospect Road, Suite 280, San Jose, CA 95129. (Decl. of Liang: ¶ 12 & Ex. I)  
17 Furthermore, defendant Image Device had listed the aforesaid San Jose address as its headquarter  
18 and (408) 455-3698 and (408) 257-1169 as its sales contacting phone number and fax number  
19 respectively on its website. (Decl. of Liang: ¶ 11) Defendant Image Device was indeed  
20 physically present in California and had continuously and systematically transacted business in  
21 California. Therefore, general jurisdiction over defendant Image Device is established.

22 By the same token, specific jurisdiction over defendant Image Device is also present.

23 (i) Defendant Image Device listed the address located at 5339 Prospect Road, Suite 280,  
24 San Jose, CA 95129 as its headquarter and (408) 455-3698 and (408) 257-1169 as its sales  
25 contacting phone number and fax number. It has therefore purposefully availed itself of the  
26 privilege of conducting business in California and thereby invoked the benefits and protection of  
27 California laws. (ii) Plaintiff's claims and damages were the result of defendants Lin, Wang and  
28 Image Device's misappropriation of plaintiffs' confidential proprietary information in customer

lists and products designs and specifications. (Comp: ¶¶ 8, 12 & 13; Decl. of Liang: ¶¶ 10, 13 & 14) (iii) California is the most efficient forum for resolution of this case because the defendants' activities and wrongdoings were committed in California. Jurisdiction may be exercised reasonably if under the totality of the circumstances the defendant could reasonably anticipate being called upon to present a defense in a distant forum. *Taubler v. Giraud* 729 F.2d 641, 649 (9<sup>th</sup> Cir. 1981), *cert. denied*, 469 U.S. 917, 105 S.Ct. 295, 83 L.Ed.2d 230 (1984). Since defendant Image Device had conducted extensive business activities to reach out to California, the burden of defending itself in California is reasonably foreseeable and less significant.

Based on the above-mentioned analyses, defendants' motion to dismiss for lack of personal jurisdiction over defendant Image Device must be denied.

### III. DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM SHOULD BE DENIED.

Rule 8(a) of the Federal Rules of Civil Procedure provides that a pleading shall contain a short and plain statement regarding the claim that plaintiff is entitled to relief.

"Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is a "short and plain statement" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 35 U.S. 41, 47 (1957) "Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues." *Id.* at 47-48. "Pleading is not a game of skill and its purpose is to facilitate a proper decision on the merits." *Id.* at 48.

All allegations of material fact in the complaint are taken as true and construed in the light most favorable to the nonmoving party. *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754 (9<sup>th</sup> Cir. 1994)

The issue is not whether plaintiff will prevail ultimately but whether he is entitled to offer evidence to support his claim. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9<sup>th</sup> Cir. 1987)

The court may not grant a motion to dismiss for failure to state a claim unless it appears

beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9<sup>th</sup> Cir. 2001)

As illustrated below, plaintiffs' complaint have satisfied the notice pleading requirement set forth in Rule 8(a) of the Federal Rules of Civil Procedure, and defendants' motion to dismiss should be denied.

(A) Plaintiffs' First Count of Statutory Misappropriation of Trade Secret presents sufficient facts and satisfies the "short and plain statement" of Rule 8(a).

California's Uniform Trade Secrets Act ("UTSA") provides that "trade secret" means information that derives independent economic value from not being generally known to the public and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. Cal. Civ. Code § 3426.1(d). One of the "misappropriation" under UTSA is further defined as disclosure or use of a trade secret of another without consent who acquired such secret under the circumstances giving rise to a duty to maintain its secrecy or limit its use, or derived from or through a person who owed a duty to the claiming party to maintain its secrecy or limit its use. Cal. Civ. Code §3426.1(b)(2). UTSA further provides that "improper means" as breach of a duty to maintain secrecy. Cal. Civ. Code §3426.1(a).

Plaintiffs in their complaint have stated that (i) a condition for the employment of defendants Lin and Wang was to not to disclose or use plaintiffs' trade secret such as customer lists and pricing data without plaintiffs' consent; (Comp.: ¶8) (ii) defendants Lin and Wang agreed to plaintiffs' employment condition; (Comp.: ¶9) (iii) plaintiffs have taken reasonable measures to insure that the confidential information was only provided to those employees who needed the information to perform their jobs and requested all such employees to agree not to disclose or use plaintiffs' trade secret without plaintiffs' prior consent and the severe consequence of any such violation; (Comp.: ¶10) and (iv) defendants Lin and Wang breached their duty and exploited plaintiffs' trade secret to their economic gains by soliciting plaintiffs' customers and engaging in direct competition with plaintiffs. The aforesaid pleading of Plaintiffs meets the requirement of "short and plain statement" and satisfies the definition set forth in UTSA.

Due to the unique and unusual business in the digital image and photo kiosk industry as distinguished from the normal card reader business carried by the mass merchant retailers, the present case is similar to the unusual roofing service in *Morlife, Inc. v. Perry*, 56 Cal.App.4<sup>th</sup> 1514, 1521 (1997) The majority of plaintiffs' revenue derives from plaintiffs' sales to the digital image and photo kiosk industry, which is the unique industry not generally known to the public. (Decl. of Liang: ¶¶ 13 & 14) Defendants Lin and Wang's key managerial positions in plaintiffs enabled them to learn all plaintiffs' confidential proprietary information. They breached such duty of confidentiality and used plaintiffs' trade secret to fulfill their personal gains. (Comp.: ¶¶ 7, 10, & 13) Defendants' allegation that plaintiff Atech's logo would render plaintiffs' trade secret obsolete because a person would know a customer uses Atech's products. (Decl. of Lin: ¶39) Such allegation is ludicrous in that even with the identification of plaintiff Atech's logo, a person would only know one of Atech's customers rather than all Atech's customer lists.

All allegations of material fact in the complaint are taken as true and construed in the light most favorable to the nonmoving party. *Clegg v. Cult Awareness Network*, 18 F.3d at 754. The issue is not whether plaintiff will prevail ultimately but whether he is entitled to offer evidence to support his claim. *Usher v. City of Los Angeles*, 828 F.2d at 561. Based on the above-mentioned rules, it is clear that defendants' motion to dismiss for failure to state a claim is unfounded and should be denied.

(B) Plaintiffs' Second Count of Common Law Misappropriation of Trade Secret is not preempted by UTSA.

Cal. Civ. Code §3426.7 provides that UTSA does not affect contractual remedies, whether or not based upon misappropriation of a trade secret or other civil remedies that are not based on misappropriation of trade secret.

In the present case, plaintiffs' second count is based on both breach of employment agreement and misappropriation of trade secret (Comp.: ¶¶ 8, 9, 10, 11, 12, 13, & 19). Such statements satisfy the notice-pleading requirement of Rule 8(a). Since the contractual remedy is also included in the plaintiff's second count, this common law misappropriation of trade secret is not preempted by UTSA as specifically set forth in California Civ. Code §3426.7.

1 (C) Plaintiff's Third Count for Breach of Employment Agreement satisfies Rule 8(a)  
 2 which requires a short and plain statement of the claim showing that plaintiff is entitled to relief.

3 Plaintiffs in their complaint provides that (i) defendants Lin and Wang worked for  
 4 plaintiffs Suntek and Atech, and agreed not to use or disclose certain plaintiffs' proprietary  
 5 information and trade secret; and (ii) defendants Lin and Wang breached the agreement and used  
 6 plaintiffs' trade secret in direct competition against plaintiffs. (Comp. ¶¶ 7, 8, 9, 11, 12 & 13)  
 7 Such statements apprise defendants of the existence of the employment agreement, their duties  
 8 under the agreement not to use or disclose of the proprietary confidential information, and their  
 9 breach of the agreement by exploiting the plaintiffs' trade secret to their economic advantage.

10 Nothing in Rule 8(a) requires plaintiffs to plead every single element of a cause of action  
 11 as asserted by defendants. (Def. Memo: P. 16:23 – P. 17:27) Plaintiffs have satisfied the notice  
 12 pleading requirement set forth in Rule 8(a). Therefore, plaintiffs' claim for breach of  
 13 employment agreement is well-pleaded under Rule 8(a).

14 (D) Plaintiffs' Fourth Count of Intentional Interference of Economic Relationship is not  
 15 preempted by UTSA.

16 California Civ. Code §3426.7 provides that UTSA does not affect contractual  
 17 remedies, whether or not based upon misappropriation of a trade secret or other civil remedies  
 18 that are not based on misappropriation of trade secret.

19 As analyzed in III (B) above, plaintiffs' fourth count is based on both breach of  
 20 employment agreement and misappropriation of trade secret (Comp.: ¶¶ 8, 9, 10, 11, 12, 13, &  
 21 21). Such statements satisfy the notice pleading requirement of Rule 8(a). Since the contractual  
 22 remedy is also included in the plaintiff's second count, this common law misappropriation of  
 23 trade secret is not preempted by UTSA as specifically set forth in California Civ. Code §3426.7.  
 24 Furthermore, plaintiffs' complaint has specifically identified one of their customers "Rpsoft Sas"  
 25 was solicited by defendants. Such short and plain statement has placed defendants on notice of  
 26 plaintiffs' existing business relationship with Rpsoft and their damages sustained due to  
 27 defendants' unfair competition. Therefore, defendants' motion to dismiss should be denied.

28 (E) Plaintiffs' Fifth Count of Conspiracy is not preempted by UTSA.

Again, plaintiffs' fifth count of conspiracy is based on both breach of employment agreement and misappropriation of trade secret (Comp.: ¶¶ 8, 9, 10, 11, 12, 13, 27, 28, & 29). This legal doctrine imposes liability on defendant Image Device who shares with defendants Lin and Wang a common plan or design in its perpetration. *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4<sup>th</sup> 503, 510-511 (1994). Therefore, plaintiff's fifth count is not preempted by UTSA under California Civ. Code §3426.7, and can be plead together with the rest four counts.

IV. DEFENDANTS' MOTION TO DISMISS SHOULD BE DENIED UNLESS DEFENDANTS PROVE BEYOND DOUBT THAT PLAINTIFFS CAN PROVE NO SET OF FACTS IN SUPPORT OF THEIR CLAIMS.

For the purposes of a motion to dismiss, the material allegations are taken as admitted, and the complaint should not be dismissed unless it appears that the claimant could prove no set of facts in support of his claim which would entitle him to relief. *Jenkins v. MsKeithen*, 395 U.S. 411, 421-22, 89 S.Ct. 1843, 23 L.Ed.2d 404 (1968).

The court should not dismiss a complaint under Rule 12(b)(6) unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim. *Balistreri v. Pacific Police Dept.*, 901 F.2d 696, 699 (9<sup>th</sup> Cir. 1988) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957)). All factual allegations are to be taken as true and construed in the light most favorable to plaintiff, and dismissal is proper only where it appears beyond doubt that plaintiff can prove no set of facts in support of his claim. *Levine v. Diamantheset, Inc.* 950 F.2d 1478, 1482 (9<sup>th</sup> Cir. 1991).

The well-established precedent in 9th Circuit is that dismissal without leave to amend is improper unless it is clear that the complaint could not be saved by any amendment. *Schneider v. California Dept. of Corrections*, 151 F.3d 1194, 1197 (9<sup>th</sup> Cir. 1998)

Rule 15(a) provides that a party may amend his pleadings once as a matter of course at any time before a responsive pleading is served.

"Federal Rules of Civil Procedure 15(a) requires that a trial court shall grant leave to amend freely when justice so requires, and the Supreme Court has stated that this mandate is to be noted. *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)" *Lopez v.*

1 *Smith*, 203 F.3d 1122, 1130 (9<sup>th</sup> Cir. 2000) “A district court should grant leave to amend even if  
2 no request to amend the pleading was made, unless it determines that the pleading could not  
3 possibly be cured by the allegation of other facts.” *Id.*

4 While defendants’ motion to dismiss asserted that plaintiffs’ complaint has failed to state  
5 a claim against defendant, defendants have not proved their allegations in the light of a system of  
6 pleading with simplified and brief forms of complaint set up by the Federal Rules of Civil  
7 Procedure. However, in the event that this Court makes such finding of failure to state a claim as  
8 alleged by defendants, plaintiffs are entitled to amend their complaint pursuant to Rule 15(a).

9 **CONCLUSION**

10 Based on the reasons stated above, defendants’ motion to dismiss should be denied in its  
11 entirety.

12 Dated: August 14, 2007

Respectfully submitted,

13  
14 /s/ Yung-Ming Chou.  
15 Yung-Ming Chou  
16 Attorney for Plaintiffs  
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PROOF OF SERVICE BY E-MAIL

Yung-Ming Chou certifies:

I am, and at times mentioned herein was, an active member of the State Bar of California and not a party to the within cause. My business address is 39111 Paseo Padre Parkway, Suite 207, Fremont, CA 94538.

On August 14, 2007, I served a copy of attached PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND DECLARATION OF LARRY LIANG IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS by electronic mail to the following recipient:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: August 14, 2007

/s/ Yung-Ming Chou  
Yung-Ming Chou